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IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,
Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ of Certiorari
To The Supreme Court of Missouri

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. AS A CLASS, JUVENILE OFFENDERS DO NOT POSSESS THE HEIGHTENED MORAL CULPABILITY REQUIRED TO JUSTIFY THE DEATH PENALTY 5

A. To Deserve A Sentence Of Death, A Defendant Must Possess A Degree Of Moral Culpability Beyond That Necessary To Find Guilt 5

B. Juveniles Have A Lesser Culpability Than Adults 6

C. As With The Mentally Retarded, Neither Retribution Nor Deterrence Justifies The Execution Of Juvenile Offenders. 11

D. Juveniles, Like The Mentally Retarded, Face A Special Risk Of Wrongful Conviction And Of Receiving Unjustified Death Sentences. 12

II. THERE IS A GROWING NATIONAL AND INTERNATIONAL CONSENSUS THAT THE DEATH PENALTY IS INAPPROPRIATE FOR JUVENILE OFFENDERS 16

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) ..... *passim*

Clay v. State, 143 Fla. 204 (Fla. 1940) 6, 7

Coker v. Georgia, 433 U.S. 584 (1977) 5, 19

Eddings v. Oklahoma, 455 U.S. 104 (1982) 7, 15

Enmund v. Florida, 458 U.S. 782 (1982) 6

Gregg v. Georgia, 428 U.S. 153 (1976) 5

Harmelin v. Michigan, 501 U.S. 957 (1991) 17

Lockett v. Ohio, 438 U.S. 586 (1978) 13

Penry v. Lynaugh, 492 U.S. 302 (1989) 17

People v. Olsen, 36 Cal. 3d 638 (Cal. 1984) 7

People v. Wise, 752 N.Y.S.2d 837 (N.Y. App. Div. 2002) 14

Stanford v. Kentucky, 492 U.S. 361 (1989) ..... *passim*

State ex rel Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) 18

Thompson v. Oklahoma, 487 U.S. 815 (1988) ..... *passim*

Trop v. Dulles, 356 U.S. 86 (1958) 17

LEGISLATIVE MATERIALS

Senate Bill 513, 2003 N.H. SB 513 18

Senate Bill 182, 2004 S.D. SB 182 18

Original House Bill No. 5, 2004 Wyo. Sess. Laws 29 18

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Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) 14

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Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635 (1993) 7

William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent Risk Taking* (Nancy J. Bell and Robert W. Bell, eds.1993) 9

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, lawyers in private practice, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

Almost since its inception, the ABA has taken an active role in advocating for the improvement of the justice system, and the ABA has taken a special interest in the improvement of the juvenile justice system. In conjunction

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the adoption of the IJA/ABA *Juvenile Justice Standards* in 1980 (the "Standards"). These Standards flowed from an exhaustive historical, legal and criminological study of society's response to juvenile crime. They reflect the experience of trained legal practitioners in a number of disciplines and are also informed by the experience of related professions that work with juvenile offenders.[2]

In addition, the ABA includes many members who are prosecutors or defense attorneys with significant experience and special expertise in the treatment of juvenile offenders under the law. The ABA Juvenile Justice Center and ABA Death Penalty Representation Project are composed of lawyers who specialize, respectively, in juvenile justice and death penalty issues. The Death Penalty Representation Project has recruited numerous *pro bono* lawyers to represent juveniles in capital cases.

Thus, the ABA, through its nationwide membership, its committees and its projects, has a substantial pool of experts with experience and insights relating to issues presented by this case. Based upon the extensive work of the ABA and its members with juveniles, the ABA endorses criminal justice policies that take into account factors unique to juveniles that affect their culpability, including the fact that juvenile offenders are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence, and limited in their ability to assist in their own defense.

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[2] As used in this brief, the terms "juvenile offenders" and "juveniles" refer to persons under the age of eighteen.

The ABA also has been active in addressing the issue of the mentally retarded and the death penalty. The ABA drew upon this experience in its *amicus* brief filed in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Although the ABA has a longstanding policy of taking no position on the death penalty as a general matter, it does oppose the death penalty for juvenile offenders. This position was first expressed in a resolution passed by the ABA House of Delegates in 1983, which states that the ABA opposes "the imposition of capital punishment upon any person for any offense committed while under the age of eighteen." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections, 17.* The 1983 resolution culminated nearly two years of research, reflection and debate by the ABA Section on Criminal Justice.[3] The ABA reaffirmed this position in a resolution passed by the ABA House of Delegates in 1997, supporting a moratorium on the death penalty until states implement a number of features, including establishment of a minimum age of eighteen for the death penalty. ABA, *Report with Recommendations No. 107* (February 1997).

The ABA recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others – renders them less responsible and less morally culpable than adults. *See* IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts*, 3 (1980). The ABA therefore believes that the moral culpability of juvenile offenders is such that they should not be subject to

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[3] ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983).

the ultimate punishment, reserved for the worst crimes and offenders – the death penalty.

SUMMARY OF ARGUMENT

1. Juvenile offenders generally do not have the heightened moral culpability that the Court requires for the imposition of the death penalty. *See, e.g. Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that mentally retarded persons do not have the required heightened moral culpability). The law has long recognized that juveniles have a reduced level of moral culpability due to their reduced capacity for sense and reason and the fact that they generally are more impulsive and less self-disciplined than adults, and this conclusion has been bolstered by recent scientific studies. Moreover, the reduced capacity of juvenile offenders means that retribution and deterrence rationales for the death penalty are inapplicable and that juveniles face a special risk of wrongful conviction and of receiving unjustified death sentences.

2. Since 1989, when the Court held that the execution of individuals who commit crimes when they are sixteen- or seventeen-years-old did not offend the Constitution, *Stanford v. Kentucky*, 492 U.S. 361 (1989), there have been significant developments in the law and society that necessitate reconsideration of this precedent. Since 1989, many states have shunned the execution of sixteen- and seventeen-year-old offenders, reflecting a broadening national consensus against putting juveniles to death. Only seven of the fifty states have executed juveniles in the past 30 years, and only approximately one-third of all states permit imposition of the death penalty against offenders under eighteen. This legislation and the empirical evidence upon which it is based reflects a general recognition that juveniles under age eighteen share deficits,

like mentally retarded individuals, that make it inappropriate to subject them to the ultimate punishment reserved for the most morally culpable members of society.

The Court recently found the imposition of the death penalty on mentally retarded persons to be unconstitutional in *Atkins* based on similar grounds. The ABA respectfully requests that the Court reconsider its decision in *Stanford v. Kentucky*, and recognize, as it has in the context of executing those who are mentally retarded, that the execution of juvenile offenders constitutes cruel and unusual punishment in violation of the U.S. Constitution.

ARGUMENT

I. AS A CLASS, JUVENILE OFFENDERS DO NOT POSSESS THE HEIGHTENED MORAL CULPABILITY REQUIRED TO JUSTIFY THE DEATH PENALTY.

A. To Deserve A Sentence Of Death, A Defendant Must Possess A Degree Of Moral Culpability Beyond That Necessary To Find Guilt.

The Court's jurisprudence establishes that, in order to satisfy the Eighth Amendment, the death penalty must be used only in cases where the conduct of the defendant or the nature of the crime demonstrates a heightened level of moral culpability beyond that needed to establish guilt. Thus, since *Gregg v. Georgia*, 428 U.S. 153 (1976), capital punishment has been permitted in the United States only for those who commit the most egregious crimes. Following this principle, the Court has held that execution is an impermissible punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584 (1977), and for a felony murderer who "did not take life, attempt to take it, or intend

to take life . . . ." *Enmund v. Florid*a, 458 U.S. 782, 789-93 (1982). Indeed, even "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State . . . ." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Only those offenders who are capable of and exhibit heightened moral culpability – beyond that sufficient to impose criminal liability – are subjected to the possibility of a death sentence. For the reasons explained below, youths under eighteen cannot be said to possess the degree of moral culpability required to justify a sentence of death.

B. Juveniles Have A Lesser Culpability Than Adults.

Many areas of the law have long acknowledged what society (especially parents) has long understood – that juveniles are less culpable than adult offenders because they are more likely as a group to be less capable than adults of fully comprehending the consequences of their actions and controlling their behavior. Historically, children were treated under Anglo-Saxon criminal law as if they were mental incompetents. Children under the age of seven were presumed conclusively to be incapable of criminal acts because they were thought to be unable to know right from wrong or to engage in the requisite intentional conduct. *See Clay v. State*, 143 Fla. 204, 208 (Fla. 1940) ("[i]t is well established at common law that a child under the age of 7 years is conclusively presumed to be incapable of committing a crime . . . ."); s*ee also* Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. Rev. 207, 226 (2003) ("Fagan"). At the same time, the criminal law generally created a rebuttable presumption of incapacity for children between the ages of seven and fourteen, a presumption that the prosecution bore the burden to overcome. *See People v. Olsen*, 36 Cal. 3d

638, 647 (Cal. 1984) (". . . statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime"); *Clay*, 143 Fla. at 208 ("the common law rule raises a presumption of incapacity of an infant between the ages of 7 and 14"). These presumptions at law were based on an "unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts." Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503, 512 (1984).

As the law evolved, it departed from the "incapacity" theory and instead concluded that children lacked culpability because they had a reduced capacity for sense and reason and lacked the ability to "function as moral agents rationally choosing their evil designs." Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. Rev. 635, 662 (1993). As this Court has stated:

> youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. [As a result,] [o]ur history is replete with laws and judicial recognition that [juveniles] . . . are less mature and responsible than adults.

Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). It thus is widely acknowledged in the law that "[juveniles] are more vulnerable, more impulsive and less self-disciplined than adults . . . [and] may have less capacity to control their conduct and to think in long-range terms than adults . . . ," characteristics that explain "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an

adult . . . ." *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (plurality opinion) (citations omitted).

Society's recognition that juveniles under eighteen do not possess the same capacity for mature reasoning that adults have is so deeply engrained that state and federal legislation has universally given juveniles distinct status in many areas of the law. *See Thompson*, 487 U.S. at 823-25 (plurality opinion). These legislative determinations include numerous age-based classifications that recognize eighteen as the minimum age that juveniles must attain before they are capable of making rational, informed decisions and taking responsibility for their actions. Consequently, juveniles are accorded a status different from adults in a number of areas of the law, including contract law and family law, as well as in several areas regulating conduct, such as the right to vote, to drink alcohol, and a growing body of restrictions on when and with whom juveniles under eighteen may operate automobiles. *Id.*; *see generally*, Fagan, *supra*, at 223-24.

In *Atkins*, the Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders based on evidence that mentally retarded persons have "diminished capacities" that render them less socially and mentally developed than non-mentally retarded adults. Their diminished cognitive functioning – and the corresponding limitations and challenges that flow therefrom – so reduce their moral culpability that the Court has drawn a bright-line rule holding unconstitutional the imposition of the death penalty on the mentally retarded. 536 U.S. at 321. Specifically, the Court in *Atkins* found:

> [m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 318. The Court further recognized that mentally retarded persons "often act on impulse rather than premeditated plan," are susceptible to influence, and are generally followers. *Id.* These deficits render the mentally retarded unable to appreciate the correlation between their actions, the consequences of those actions and the subsequent punishment for those actions, and therefore unable to alter their actions in accordance with their moral judgment. "[These] deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.*

Juveniles share nearly all of the developmental characteristics of the mentally retarded that support their categorical ineligibility for the death penalty. Like the mentally retarded, juveniles have decreased abilities to regulate their actions, understand the correlation between their actions and the consequences of those actions, and to appreciate the impact of the resulting punishment for their actions.[4] Moreover, recent scientific research supports the

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[4] *See* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent Risk Taking* 78-79 (Nancy J. Bell & Robert W. Bell eds., 1993); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 Law & Hum. Behav. 249 (1996) (noting that juveniles have lesser capacity in the following components of

conclusion that the brains of juveniles are less developed than those of non-mentally retarded adults.[5] Moreover,

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the decision-making process: (1) autonomous choice, (2) self-management, (3) risk perception, and (4) calculation of future risks); William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, Adolescents in the AIDS Epidemic 24 (William Gardner *et. al.* eds., 1990) (noting that juveniles give disproportionate weight to the short term effects of their actions); and B. Bradford Brown, *Peer Groups and Peer Cultures, in At the Threshold: The Developing Adolescent* 171 (S. Shirley Feldman and Glen R. Elliot eds., 1990)("Feldman & Elliot") (noting that juveniles are more susceptible to peer influence than non-mentally retarded adults).

[5] *See* Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs. 417 (2000); E. R. Sowell *et al., In Vivo Evidence for Post-Adolescent Brain Mutation in Frontal and Striatal Regions,* 2 Nature Neuroscience 859 (1999); Elkohon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001) pp. 144-145; A. A. Baird *et al., Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. Am. Academy of Child & Adolescent Psychiatry 195 (1999); Elizabeth S. Scott and Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 801 (Feb. 2003)(citing Ronald Dahl, *Affect Regulation Brain Development, and Behavioral/ Emotional Health in Adolescence*, 6 CNS Spectrums 60 (2001)).

juveniles have fewer life experiences to inform their decision making. Thus, like the mentally retarded, while juveniles may know the difference between right and wrong and may be competent to stand trial, they are less competent decision makers than non-mentally retarded adults because they have underdeveloped decision making capacities.

In light of their developmental similarities, what the Court said of the mentally retarded in *Atkins* applies equally to juvenile offenders: "Because of their [deficiencies] in areas of reasoning, judgment, and control of their impulses, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. These deficiencies reduce juvenile offenders' moral culpability so significantly that a categorical bar on the imposition of the death penalty is constitutionally required.

C. As With The Mentally Retarded, Neither Retribution Nor Deterrence Justifies The Execution Of Juvenile Offenders.

Atkins also recognized that the two purported justifications for the death penalty – retribution and deterrence – are not served by executing the mentally retarded. Again, because their cognitive impairments prevent them from "[acting] with the level of moral culpability that characterizes the most serious criminal conduct," the retribution or "just deserts" rationale for the death penalty is inapplicable to the mentally retarded. 536 U.S. at 306. Similarly, the deterrence justification is without force because the cognitive impairments of mentally retarded individuals "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

These same rationales apply as well to juvenile offenders. Because the retribution justification for the imposition of the death penalty is based principally on the moral culpability of offenders, and because juveniles are less morally culpable than adults, the retribution rationale for the death penalty is also inapplicable to juvenile offenders.

Nor is deterrence served by executing juvenile offenders, rather than imposing severe prison sentences for their crimes. As discussed above, the state of adolescence can be characterized by poor impulse control, an inability to envision the consequences of one's acts, and a belief in one's own invincibility. Because of these characteristics, the threat of the death penalty does not add any meaningful deterrent effect beyond the threat to a juvenile of being tried as an adult and imprisoned for life.

There is an additional reason why the death penalty is inappropriate for juvenile offenders that makes juveniles even less deserving of the death penalty: society generally recognizes that juvenile offenders are more capable of rehabilitation than adults.

D. Juveniles, Like The Mentally Retarded, Face A Special Risk Of Wrongful Conviction And Of Receiving Unjustified Death Sentences.

An additional and equally compelling reason for instituting a categorical rule against the execution of juvenile offenders is the heightened risk of a tragic miscarriage of justice, either through the conviction of a factually innocent defendant of a capital crime or the unjustified imposition of a death sentence. As the Court in *Atkins* concluded:

> [t]he risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded persons may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21. Like the mentally retarded, juveniles are less effectively protected by important safeguards that serve to assure reliable results in criminal trials and sentencing proceedings. This deficiency, coupled with their immaturity, could "jeopardize the reliability and fairness of capital proceedings against [them]." *See Atkins, 536 U.S.* at 306-07.

First, juveniles' developmental limitations subject them to the increased possibility of being wrongfully convicted of capital crimes they did not commit. In particular, juveniles, like the mentally retarded, are more susceptible to coercion and more likely to be intimidated into making false confessions than are adults.

Indeed, there are a number of cases where it has been determined by objective evidence that juveniles falsely confessed to crimes they did not commit, including grisly crimes. The Central Park Jogger case is a well known example of a situation where juveniles made such erroneous

confessions and were exonerated only after they completed their lengthy sentences.[6] Likewise a teenage offender on death row in Texas was recently found, on the basis of DNA evidence, to have been innocent of a rape and murder to which he confessed as a juvenile.[7]

These examples are part of a disturbing pattern as demonstrated by a recent study of exoneration cases since 1989, conducted by researchers at the University of Michigan School of Law, where the defendants' convictions were nullified by official acts by governors, courts or prosecutors because of compelling evidence that they were not guilty. Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States*, 1989 through 2003 (April 19, 2004).[8] This examination found that 44% of the juveniles exonerated during that period had falsely confessed to crimes they did not commit. *Id.* at 20-21. *See also* Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 966-68 (2004)(describing 40 false confessions by juveniles).

The higher risk of wrongful conviction among juveniles is unsurprising in view of developmental deficiencies described in Section I.B. above that make

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6 *See People v. Wise*, 752 N.Y.S.2d. 837 (N.Y. App. Div. 2002).

7 *See* UPI, *Judge Frees Wrongly Convicted Man* (Jan. 16, 2001); Henry Weinstein, *DNA Testing Clears Texas Murderer and "Accomplice,"* p. A-1 (Los Angeles Times, (Oct. 14, 2000).

8 This report can be accessed at: http://www.law.umich.edu/ NewsAndInfo/ /exonerations-in-us.pdf.

juveniles less able than adults to assist in their defense at trial. Juveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel. Juveniles tend to telescope the future and do not appreciate long-term consequences of their actions, impairing their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy. Juveniles also lack sufficient experience to help them recognize exculpatory facts and communicate them to their counsel. As the Court held in the case of the mentally retarded, these limitations weigh against imposing the death penalty against juveniles. *See Atkins*, 536 U.S. at 320-21.

Juveniles, like the mentally retarded, likewise risk an increased possibility of being wrongly convicted of capital offenses when lesser degrees of homicide are the appropriate verdicts. Juveniles face this risk not only because of the factors discussed above, but because they are more likely to exaggerate their roles in crimes due to pressure from peers or older co-defendants, out of a desire to show off, or in order not to show their fear. *See generally*, *Eddings*, 455 at 115; *Thompson*, 487 at 835; Feldman and Elliot.

Finally, like those with mental retardation, juveniles are exposed to an increased risk of being sentenced to death in cases where, were all available mitigating evidence presented, the sentence would be less than death. In particular, juveniles are less able than adults to assist in developing mitigating evidence in the penalty phase of their trial. The characteristics of adolescence that subject teenagers to a greater risk of wrongful conviction or a capital conviction (*e.g.*, their lack of experience in recognizing exculpatory facts and their susceptibility to exaggerating or mischaracterizing their role) also are similar to characteristics of the mentally retarded that the Court found impedes their ability to "make a persuasive showing of

mitigation in the face of prosecutorial evidence of one or more aggravating factors." *See Atkins*, 536 U.S. at 320. These characteristics are common among sixteen- and seventeen-year-olds, not just among youth aged fifteen and below.

In particular, juveniles' immaturity and/or embarrassment often impedes their disclosure of prior emotional, physical or sexual abuse, crucial evidence that frequently forms the bedrock of mitigation in capital proceedings. Similarly, juveniles are less likely than adults to disclose mental health problems or to have their mental illnesses diagnosed, and by virtue of their age, are less likely to have received treatment for existing disorders. Dorothy Otnow Lewis *et. al., Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 American Journal of Psychiatry 584 (May 1988). Thus, the corroborating evidence so necessary to prepare adequate mitigation defenses often has not been presented to juries in juveniles' death penalty trials, leading to death sentences in instances where such sentences would be inappropriate if all the mitigating facts were known.

II. THERE IS A GROWING NATIONAL AND INTERNATIONAL CONSENSUS THAT THE DEATH PENALTY IS INAPPROPRIATE FOR JUVENILE OFFENDERS.

In *Atkins*, the Court held that Eighth Amendment claims of excessive punishment must be based on society's evolving standards of decency:

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01.

536 U.S. at 311-12. The Court went on to note that "evolving standards should be informed by 'objective factors to the maximum possible extent,'" and "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

The Court considered such objective evidence regarding state legislation in each of its two most recent decisions regarding the constitutionality of the death penalty for juveniles. In *Thompson v. Oklahoma*, the Court relied on the fact that every state with a death penalty statute on the books required that the defendant be at least sixteen at the time of the capital offense, and thus set sixteen as the minimum age for eligibility for the death penalty under the Eighth Amendment. 487 U.S. at 829. When the Court refused to increase the minimum age to eighteen in *Stanford v. Kentucky*, the Court found that 25 of the 37 death penalty states permitted the execution of juvenile offenders. 492 U.S. at 370.

National standards regarding the execution of juvenile offenders have substantially evolved since the *Stanford* decision. As the Supreme Court of Missouri here

found, since 1989, five more states have established eighteen as the minimum age for capital offenses.[9] This trend, moreover, is steadily progressing: since the time of the Missouri Court's decision in this case below, South Dakota and Wyoming enacted laws raising the minimum eligible age for the death penalty to eighteen years.[10]

By contrast, no state has lowered the minimum age from eighteen since the Court's *Stanford* decision. As a result, and taking into account the Missouri Supreme Court's ruling here, only 19 of the 50 states – little more than one third of all states and less than 50% of the 39 states that allow the death penalty -- now permit the execution of offenders under eighteen. Moreover, eighteen is the minimum statutory age for the federal death penalty in both the civilian and military courts.[11]

In *Atkins*, the Court also looked at evidence other than enacted legislation, holding that "the objective evidence,

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9 Montana, Indiana and Washington raised the minimum age to eighteen, while Kansas and New York enacted death penalty legislation that established eighteen as the minimum age. *See State ex rel Simmons v. Roper*, 112 S.W.3d 397, 408 (Mo. 2003).

10 Senate Bill 182, 2004 S.D. SB 182; Original House Bill No. 5, 2004 Wyo. Sess. Laws 29 (to be codified at Wyo. Stat. 6-2-101(b)). In addition, the New Hampshire legislature passed legislation raising the minimum age to eighteen only to see that legislation vetoed by the governor. Senate Bill 513, 2003 N.H. SB 513 (vetoed May 10, 2004).

11 *See Simmons*, 112 S.W.3d at 408.

though of great importance, did not 'wholly determine' the controversy." *Atkins*, 536 U.S. at 313 (quoting *Coker v. Georgia*, 433 U.S. at 597). For example, the Court relied on the fact that only a few states with laws permitting the execution of the mentally retarded actually engaged in such executions in practice. *Atkins*, 536 U.S. at 316. The Missouri Court explained in detail how the same is true today with respect to juveniles. Only twelve states currently have juvenile offenders on death row, and only seven states have actually executed a juvenile since 1976.[12] In this small group of states, only 22 juveniles have actually been executed, and thirteen of them (almost 60 percent) have been executed in Texas alone.[13] This high concentration of executions of juvenile offenders in a single state further illustrates that such executions are not the norm for most of our society. These developments evidence a compelling national consensus that 18 should be the minimum age for the application of the death penalty.

It is especially telling that the solidifying national consensus against the execution of juveniles comes during an era when states otherwise are lowering the age for juvenile offenders to be treated as adults and expanding the class of crimes that subject juveniles to adult jurisdiction and punishment. Yet, since *Stanford*, despite the trend towards more vigorous application of adult criminal jurisdiction to

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12 The ABA has developed a web page entitled *Juvenile Death Penalty Resources & Information*, which contains detailed statistics regarding the execution of juveniles and the number of juveniles on death row. The address of this web page is http://www.abanet.org/crimjust/juvjus/resources.html

13 *Id.*

juveniles, no state has joined the diminished ranks of those willing to execute juvenile offenders. State and federal legislators, and the public they represent, recognize that, when it comes to juveniles, the death penalty is different.

The consensus against the execution of juvenile offenders also is evidenced by the positions of national organizations with interest, expertise, and experience in this issue, including the ABA, the leading organization representing the legal profession. While it is true that the ABA opposed the death penalty for juvenile offenders prior to the *Stanford* decision, the ABA reconfirmed that position subsequent to *Stanford* when it supported a moratorium against the death penalty until, *inter alia*, the death penalty has been eliminated for juvenile offenders. ABA, *Report with Recommendations No. 107* (February 1997).

Finally, the United States is virtually alone among the world's nations in permitting the execution of juvenile offenders, a factor this Court considered in *Thompson* and again in *Atkins*. *Thompson*, 487 U.S. at 830-31; *Atkins*, 536 U.S. at 316 n.21. Since 2000, the only other countries reported to have executed juveniles are the Democratic Republic of Congo, Iran and Pakistan, and of these countries, Pakistan recently has raised the death penalty eligibility age to eighteen.[14] Moreover, the executions of juvenile offenders in these countries were under special circumstances, leaving the United States as the only country in the world that openly continues to execute juvenile

[14] Amnesty International, *The Exclusion of Child Offenders From the Death Penalty Under General International Law*, 6 (July 2003).

offenders within the framework of its regular criminal justice system.[15]

[15] *Id.*

CONCLUSION

For the reasons stated above, the judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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